This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).

STATE OF MINNESOTA
IN COURT OF APPEALS
A20-1125

State of Minnesota,
Respondent,

vs.

Tonia Nicole Williams,
Appellant.

Filed August 2, 2021
Affirmed
Connolly, Judge

Hennepin County District Court
File No. 27-CR-19-6407

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Adam E. Petras, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Melissa V. Sheridan, Sharon E. Jacks, Assistant Public Defenders, St. Paul, Minnesota (for appellant)

Considered and decided by Bratvold, Presiding Judge; Connolly, Judge; and Hooten, Judge.

NONPRECEDENTIAL OPINION

CONNOLLY, Judge

On appeal from her conviction of driving while impaired (DWI) test refusal, appellant argues that (1) there was insufficient evidence to support her conviction; (2) the district court plainly erred by failing to instruct the jury that respondent needed to prove that she intended to refuse the breath test; and (3) the prosecutor committed prejudicial misconduct by eliciting improper opinion testimony from the state trooper. We affirm.

FACTS

Respondent State of Minnesota charged appellant Tonia Williams with felony refusal to submit to a chemical test. At trial, the state presented evidence establishing that, on March 17, 2019, at 1:12 a.m., Minnesota State Trooper Troy Utes was parked on an Interstate 94 entrance ramp, when he observed a vehicle drive by at about "a hundred miles an hour—flying by all other traffic." Trooper Utes gave chase, and when he caught up to the vehicle, he observed that it had "whiskey plates" and was "weaving back and forth within its lane." Trooper Utes activated his lights to initiate a traffic stop, but the vehicle did not stop. Instead, the vehicle "started to accelerate," prompting the trooper to turn on his squad car's siren and spotlight and call for backup.

Trooper Utes followed the vehicle onto Interstate 694, where it eventually stopped. Trooper Utes then approached the passenger side of the vehicle and observed that it was occupied by two juvenile male passengers, as well as the driver, whom he identified as Williams. As he spoke with Williams, Trooper Utes "could smell an odor of alcoholic beverage coming from the car and observed that [Williams's] eyes appeared to be

bloodshot and watery." The trooper also observed that there was an "ignition interlock" device that was installed in the vehicle. Trooper Utes explained that ignition interlock devices "are placed in vehicles, generally from prior DWI offenses." According to Trooper Utes, these devices require that the driver blow into them to start the vehicle, and then re-blow into them at intervals while they are driving to keep the vehicle running.

Based on his observations, Trooper Utes directed Williams to step out of the vehicle to begin administering field sobriety tests. The trooper began with the horizontal-gaze nystagmus (HGN) test, which he made it "most of the way" through before Williams began arguing and stopped complying. But although he was unable to finish the HGN test, Trooper Utes observed "four of the six clues" indicating impairment. And while she was outside of the vehicle, the trooper "could still smell alcohol coming from [Williams]."

Because of Williams's argumentative demeanor, Trooper Utes ended field sobriety testing and attempted to administer a preliminary breath test (PBT). Trooper Utes gave Williams two opportunities to provide a PBT sample, but each time, she would put her mouth on the straw, puff her cheeks, and not "blow any air" into the device. Trooper Utes then informed Williams that he was placing her under arrest, prompting Williams to try and "push past" the trooper. Trooper Utes claimed that he and another trooper "physically had to grab her" and "stop her," and place her in the back seat of the squad car.

After she was placed in the squad car, Trooper Utes attempted to administer a third PBT. But according to the trooper, Williams exhibited the same conduct, "where she puffed her cheeks up and didn't blow." During this test, Trooper Utes used the "manual capture button where I can just manually capture whatever air is in" the device. Trooper

Utes explained that "I just captured the air that was around her mouth and obtained [an alcohol concentration] reading of .065 at that point without her blowing any air into it."

Trooper Utes transported Williams to the county jail where she was read the implied consent advisory. The advisory informed Williams that refusal to take a breath test is a crime. After speaking with an attorney, Williams agreed to take a breath test. But according to Trooper Utes, "Williams did the same thing she did on the side of the road—where she just kind of puffed her cheeks up [and] didn't blow any air into it."

Trooper Utes treated the situation as a test refusal and Williams was booked on that charge. During a search of Williams's purse incident to her arrest, law enforcement found LorazepaM and Hydrocodone pills. According to Trooper Utes, LorazepaM is "commonly used to treat anxiety," and is "considered a central nerve system depressant, which . . . has a similar effect that alcohol would be in your system."

The defense presented the testimony of both of Williams's juvenile passengers. One of the juveniles testified that he did not see Williams consume alcohol on the night of March 16, 2019, and the other testified that he observed her, and nobody else, blow into the ignition interlock device. Williams testified that she was not drinking the night she was stopped, and claimed that she blew into the ignition interlock device at 1:12 a.m. on March 17, 2019. Williams also testified that she did not intend to refuse the breath test, claiming that she was "blowing" in the same manner as she blew into the interlock device.

A jury found Williams guilty of first-degree DWI-test refusal. The district court sentenced Williams to 42 months in prison, but stayed execution of that sentence, and placed her on probation for three years. This appeal follows.

DECISION

I.

Williams challenges the sufficiency of the evidence supporting her conviction. When reviewing a sufficiency-of-the-evidence challenge, we examine the record "to determine whether the evidence and reasonable inferences drawn therefrom, viewed in a light most favorable to the verdict, were sufficient to allow the jury to reach its verdict." *State v. Hohenwald*, 815 N.W.2d 823, 832 (Minn. 2012) (quotation omitted). In conducting this review, this court assumes that the jury "believed the state's witnesses and disbelieved any evidence to the contrary." *Id.* We will not "disturb a verdict if the jury, acting with due regard for the presumption of innocence and for the necessity of overcoming it by proof beyond a reasonable doubt, could reasonably conclude that the defendant was proven guilty of the offense charged." *State v. Flowers*, 788 N.W.2d 120, 133 (Minn. 2010) (quotation omitted).

The above-stated standard of review applies so long as a conviction is adequately supported by direct evidence. *State v. Horst*, 880 N.W.2d 24, 39 (Minn. 2016). Direct evidence is "evidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption." *State v. Harris*, 895 N.W.2d 592, 599 (Minn. 2017) (quotation omitted). Conversely, circumstantial evidence is "evidence from which the factfinder can infer whether the facts in dispute existed or did not exist." *Id.* (quotation omitted). A conviction depends on circumstantial evidence if proof of the offense, or a single element of the offense, is based solely on circumstantial evidence. *See State v. Fairbanks*, 842 N.W.2d 297, 307 (Minn. 2014).

If a conviction necessarily depends on circumstantial evidence, a reviewing court applies a heightened standard of review. *Id.* The review applicable to circumstantial evidence consists of a two-step analysis. *State v. Moore*, 846 N.W.2d 83, 88 (Minn. 2014). First, the circumstances proved are identified. *See id.* "In identifying the circumstances proved, we assume that the jury resolved any factual disputes in a manner that is consistent" with the verdict. *Id.* Second, "we examine independently the reasonableness of the inferences that might be drawn from the circumstances proved" and "determine whether the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis except that of guilt." *Id.* (quotations omitted). At the second step of the analysis, this court gives no deference to the jury's verdict. *Loving v. State*, 891 N.W.2d 638, 643 (Minn. 2017). In assessing the circumstances proved and the inferences that may be drawn from them, we consider the evidence as a whole rather than examining each piece of evidence in isolation. *State v. Taylor*, 650 N.W.2d 190, 206 (Minn. 2002).

Here, Williams was convicted of refusal to submit to a chemical breath test under Minn. Stat. § 169A.20, subd. 2(1) (2018). To be convicted of that offense, the state was required to prove, among other things, that at the time of arrest, police had probable cause that Williams drove, operated, or had physical control of the vehicle while impaired. *See* Minn. Stat. §§ 169A.51, .52 (2018); *see also* Minn. Stat. § 169A.20, subd. 2 (2018) (incorporating sections 169A.51, .52); *State v. Ouellette*, 740 N.W.2d 355, 360 (Minn. App. 2007) (holding that prerequisites for testing under section 169A.51 are elements of criminal test refusal), *review denied* (Minn. Dec. 19, 2007). Probable cause to arrest for DWI exists if the circumstances at the time of arrest reasonably warrant a prudent, cautious

officer to believe the person was driving while under the influence of alcohol. *Reeves v. Comm'r of Pub. Safety*, 751 N.W.2d 117, 120 (Minn. App. 2008).

Williams argues that the "state failed to prove beyond a reasonable doubt that, when the trooper asked for a breath sample, there was probable cause that Williams was under the influence of alcohol." She argues that, when addressing this issue, we should apply the circumstantial-evidence standard of review because inferences from an officer's direct observations "must be made to prove probable cause as an element of test refusal." Williams contends that, upon application of the circumstantial-evidence standard of review, her conviction cannot stand because there is a "rational inference from the circumstances proved" that when Trooper Utes asked her to take the breathalyzer, "there was probable cause she was taking and affected by her prescription medication."

Williams's argument is unavailing. The underlying facts establishing probable cause were based on the trooper's *direct* observations. Moreover, Williams cites no case, precedential or otherwise, applying the circumstantial-evidence standard of review to a sufficiency-of-the-evidence challenge related to the probable-cause element in a test-refusal case. We, therefore, apply the direct-evidence standard of review to Williams's sufficiency-of-the-evidence challenge.

The record reflects that Trooper Utes observed Williams driving her vehicle at approximately 100 miles per hour and "weaving back and forth within [her] lane." He also observed that Williams's vehicle had "whiskey plates," and that she did not stop immediately after the trooper activated his squad-car lights. The squad-car video corroborates Trooper Utes's observations of Williams's erratic driving, which can be

indicia of intoxication. *See State v. Driscoll*, 427 N.W.2d 263, 265 (Minn. App. 1988) (stating that erratic driving and failing to observe traffic laws can be indicia of intoxication).

Moreover, Trooper Utes "could smell an odor of alcoholic beverage coming from the car and observed that [Williams's] eyes appeared to be bloodshot and watery." He also observed four clues of impairment during his administration of the HGN test. In addition, when Trooper Utes attempted to administer the PBT, Williams would not "blow any air" into the device. And during his administration of the HGN test and PBT test, Williams became agitated and uncooperative. Each of these indications can constitute indicia of impairment. *See State v. Kier*, 678 N.W.2d 672, 678 (Minn. App. 2004) (acknowledging that recognized indicia of impairment include an odor of alcohol, bloodshot and watery eyes, and an uncooperative attitude), *review denied* (Minn. June 15, 2004).

"An officer needs only one objective indication of intoxication to constitute probable cause to believe a person is under the influence." *Id.* (quotation omitted); *Holtz v. Comm'r of Pub. Safety*, 340 N.W.2d 363, 365 (Minn. App. 1983) (stating that a police officer "need only have one objective indication of intoxication to constitute reasonable and probable grounds to believe a person is under the influence"). Here, Trooper Utes directly observed several indications of impairment. Accordingly, direct evidence supports the jury's determination that Trooper Utes had probable cause that Williams was driving while impaired.

II.

Williams argues that the district court erred by failing "to instruct the jury on a critical offense element: that the state had to prove beyond a reasonable doubt Williams intended to refuse the breath test." We review jury instructions in their entirety to assess whether the instructions "fairly and adequately explain the law" and reviewing courts "give district courts broad discretion and considerable latitude in choosing the language of jury instructions." *State v. Milton*, 821 N.W.2d 789, 805 (Minn. 2012) (quotation omitted).

Where, as here, the jury instructions were not objected to at trial, the plain-error standard of review is applicable. *Id.* The district court plainly errs if there is (1) an error, (2) that is plain, and (3) that affected the defendant's substantial rights. *Id.* An error is plain if it contravenes caselaw, a rule, or a standard of conduct. *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). If the three prongs of the plain-error test are met, this court then decides whether the error must be addressed "to ensure fairness and the integrity of the judicial proceedings." *Milton*, 821 N.W.2d at 805 (quotation omitted).

As addressed above, "[i]t is a crime for any person to refuse to submit to a chemical test . . . of the person's breath" once requested to do so by a police officer who has probable cause to believe the person has been operating a motor vehicle while impaired. Minn. Stat. § 169A.20, subd. 2(1); Minn. Stat. § 169A.51, subd. 1(b). If a driver's conduct frustrates, delays, or defeats the testing process, it constitutes a refusal. *State v. Collins*, 655 N.W.2d 652, 658 (Minn. App. 2003), *review denied* (Minn. Mar. 26, 2003); *see also State v. Ferrier*, 792 N.W.2d 98, 102 (Minn. App. 2010) (stating that refusal may be done verbally or through conduct), *review denied* (Minn. Mar. 15, 2011). Test refusal may be explicit or

may be inferred from the totality of the circumstances. *Ferrier*, 792 N.W.2d at 101. As a result, this court held in *Ferrier*, that "refusal to submit to chemical testing includes any indication of actual unwillingness to participate in the testing process, as determined from the driver's words and actions in light of the totality of the circumstances." *Id.* at 102.

Here, the district court instructed the jury, in relevant part, that:

> A failure to complete the entire test is a refusal. In the case of a breath test, the entire test must consist of one adequate breath sample analysis, one calibration standard analysis, and a second adequate breath sample analysis. Refusal can be shown in a number of ways, including a verbal refusal, an indication of unwillingness to comply, or actions that frustrate the testing process.

Williams contends that because the "state alleged Williams was deemed to have refused a breath test by conduct not words," even though Williams "repeatedly agreed to take the test," the district court's "failure to instruct the jury that they had to find Williams intended to refuse the test contravened *Ferrier* and constituted plain error." We disagree. In *Ferrier*, this court analyzed the language of the test-refusal statute and concluded that the statute requires a volitional act because the phrase "to refuse" plainly means "to indicate unwillingness to do, accept, give, or allow something." *Id.* at 101 (quotation omitted). This court articulated the requisite mens rea as "[a]ctual unwillingness to submit to testing." *Id.*

The jury instruction here required proof of "unwillingness to comply, or actions that frustrate the testing process." This language accurately states the law. Although the jury instruction did not state that a test refusal must be shown by an "*actual* unwillingness" to submit to testing, and instead stated that it can be shown by an "*indication* of unwillingness

to comply," such language is consistent with *Ferrier*. *See Ferrier*, 792 N.W.2d at 102 (stating that "refusal to submit to chemical testing includes any *indication* of actual unwillingness to participate in the test process" (emphasis added)). Accordingly, the district court's jury instructions were not plainly erroneous.

III.

Williams contends that the prosecutor committed prejudicial misconduct by eliciting improper opinion testimony from Trooper Utes. A prosecutor's failure to prepare his or her witnesses prior to trial and subsequent eliciting of inadmissible testimony may constitute misconduct. *State v. Richmond*, 214 N.W.2d 694, 695 (Minn. 1974).

At trial, the prosecutor asked Trooper Utes: "Based on your training and experience and your observations of [Williams], did you form an opinion as to whether [she] refused to submit to testing of her breath?" The trooper responded: "Yes, ma'am." The prosecutor also asked the trooper if Williams's conduct constituted a "refusal under the . . . law?" The trooper answered, "Yes." And the prosecutor elicited testimony from Trooper Utes referencing the breath-test machine's printout as an indication of a test refusal, as well as opinion testimony from the trooper that Williams "had no intention of providing any breath sample."

Williams argues that the elicitation of the above-referenced testimony constitutes prosecutorial misconduct that affected her substantial rights. Because Williams did not object to the alleged prosecutorial misconduct at trial, the modified plain-error standard of review is applicable. *See Ramey*, 721 N.W.2d at 302. Under this standard, the defendant must "demonstrate both that error occurred and that the error was plain." *Id.* If such a

showing is made, the burden shifts to the prosecution to demonstrate a lack of prejudice; in other words, that the misconduct did not affect substantial rights. *Id.* When examining a claim of prejudicial error, appellate courts focus on the strength of the evidence, the pervasiveness of the error, and whether the defendant rebutted the improper evidence. *State v. Davis*, 735 N.W.2d 674, 682 (Minn. 2007).

Assuming, without deciding, that the prosecutor committed misconduct, we conclude that the state has met its burden of proving that there is no reasonable likelihood that the absence of the misconduct would have had a significant effect on the verdict of the jury.[1] *See Ramey*, 721 N.W.2d at 302. Trooper Utes testified at length about Williams's indicia of intoxication, her lack of cooperation in the administration of the PBT, and her subsequent lack of cooperation with the breath-test machine at the jail. Moreover, the audio of a video was introduced into evidence depicting Williams's failure to blow during the three minutes of allotted time for the breath-test machine. The audio of the video also depicted Williams arguing with the trooper, rather than trying to provide a breath sample. And the state introduced the printout from the machine showing that Williams failed to provide a normal breath sample. Given the substantial evidence supporting a finding that

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[1] In her reply brief, Williams argues that the state has forfeited any argument that the alleged prosecutorial misconduct affected Williams's substantial rights because the state only addressed the issue in a footnote. But the state was not raising the argument on appeal. And although the supreme court has stated that it "may assume that in a direct appeal, the state's failure to assert a harmless-error argument in its responsive brief is waiver of the harmlessness issue," the court explained that there is an exception if "it is 'obvious' that the district court's error was harmless." *State v. Porte*, 832 N.W.2d 303, 313 (Minn. App. 2013).

Williams, by her conduct, was uncooperative in providing an adequate breath sample, we conclude that any prosecutorial misconduct did not affect Williams's substantial rights.

Affirmed.